

Delta Mechanical, Inc. and Sheet Metal Workers Local 54, a/w Sheet Metal Workers International Association, AFL-CIO. Case 16-CA-17235

February 26, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND FOX

On May 30, 1996, Administrative Law Judge Richard J. Linton issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Delta Mechanical, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Robert G. Levy II, Esq., for the General Counsel.

L. G. Clinton Jr., Esq., of Houston, Texas, for the Respondent.

Patrick M. Flynn, Esq., of Houston, Texas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. This is a "salting" case in which, the Government alleges, Delta Mechanical, on December 29, 1994, "and continuing to date," failed to consider Douglas McGee and six others for employment and refused to allow them to file applications for employment. Denying the allegation, Delta defends on the grounds that (1) there were no job openings on December 29 and, by written and posted policy, when it is not hiring, Delta does not accept applications, and (2) that McGee and the others were not good-faith job applicants and, therefore, were not members of the employee class. Finding no prima facie case that Delta in fact was hiring and accepting applica-

tions on December 29, I dismiss that (the major) portion of the complaint.

I presided at this 1-day trial in Houston, Texas, on March 14, 1996. Trial was pursuant to the January 12, 1996 complaint and notice of hearing (complaint) issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 16 of the Board.

The complaint is based on a charge filed March 3, 1995, by Sheet Metal Workers Local 54, a/w Sheet Metal Workers International Association, AFL-CIO (the Union, Local 54, or the Charging Party), against Delta Mechanical, Inc. (Delta, Respondent, or Company).

In the Government's complaint, the General Counsel alleges that Delta violated Section 8(a)(1) of the Act when Dewey Snyder, Delta's leadman at the Albert B. Moorehead Junior High School jobsite in Conroe, Texas, in January 1995, allegedly threatened employees with discharge if they supported the Union, and violated Section 8(a)(3) of the Act about December 29, 1994, "and continuing thereafter," has failed to consider seven named employees for employment and "has refused to allow them to file applications for employment" by Delta. By its answer, Delta denies.¹

The pleadings establish that the Board has both statutory and discretionary jurisdiction over Delta, that Delta is a statutory employer, and that Sheet Metal Workers Local 54 is a statutory labor organization.

For witnesses, the General Counsel called Danny Winters (under Fed.R.Evid. 611(c)), Delta's general superintendent during the relevant time; Jerry E. Winters, Delta's president, also under 611(c); Douglas M. McGee, an organizer for the Union; Alex Soria, a person who worked as a sheet metal helper on the Conroe (Moorehead School) job; and Donald G. Schurr, a person who worked on the Moorehead School job as a sheet metal mechanic. The General Counsel then rested. (1:240.)² Delta then called Danny Winters as Company's witness in Respondent's case-in-defense. Delta then rested. (1:247.) There was no rebuttal stage.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel (by letter, the Union adopted the argument of the General Counsel) and Delta, I make the following

FINDINGS OF FACT

A. Procedural Matters

1. Delta's posttrial brief untimely, but considered

Delta's posttrial brief was filed untimely. The due date for filing was April 19, 1996, a Friday. (1:247.) As shown by Delta's certificate of service for its brief, on April 19 counsel sent the original, with copies, by Federal Express to the Atlanta office of the Judges Division for official filing. The Atlanta office received Delta's brief on Monday, April 22. The filing of briefs is governed by 29 CFR §102.111(b). Under that rule, for the mailing to be timely it must be postmarked, or tendered to the delivery service (such as Federal Express), on or before "the day before the due date." In our case that

¹ All dates are for 1994 unless otherwise indicated.

² References to the one-volume transcript of testimony are by volume and page. Exhibits are designated G.C. Exh. for the General Counsel's and R. Exh. for Respondent Delta's.

means Delta had to tender the brief to Federal Express no later than Thursday, April 18, 1996. Briefs "which are postmarked on or after the due date are untimely." 29 CFR §102.111(b). Nevertheless, as no party has objected and moved to strike Delta's untimely brief, as I received a courtesy copy by delivery service on April 19, and as no prejudice is apparent, I have considered Delta's posttrial brief.

2. Videotapes and the *Jencks* rule

a. Applicable law

As discussed in more detail later, on the late morning of December 29, 1994, Union Organizer McGee and six others entered the lobby of Delta's office. One member of the group videotaped the visit.

When the General Counsel passed Union Organizer McGee for cross-examination, Delta requested copies of "all statements given or adopted by this witness," including the videotape, and argued that the videotape must be produced under the Board's *Jencks* rule, 29 CFR §102.118(b)(1) and (d).³ Delta argued that McGee's remarks on the videotape constitute a "statement" within the meaning of the *Jencks* rule. (1:123-127.) Although expressing the view that the videotape was not so covered, the General Counsel nevertheless voluntarily produced it. (1:127.)

Contemporaneous statements captured on a tape recording⁴ or a videotape⁵ at a substantive event are not a *Jencks* "statement" (because not a description of a past event). Instead, they are direct evidence because they are part of the substantive event itself.⁶ Thus, even had there been a covering affidavit by McGee authenticating the videotape (no such showing here), such authentication (even with words of adoption) would not convert a past event, the direct evidence, into a *Jencks* current description of a past event. As direct evidence, the videotape here was subject to a subpoena duces tecum. Because the subpoena process would have caused an unnecessary loss of time, and still have resulted in production of the videotape, the General Counsel's voluntary accommodation of Respondent's request advanced the hearing.

b. Transcript of the videotape

Eventually a copy of the videotape was received in evidence as Respondent's Exhibit 4. (1:187.) By conference call on March 27 (the Union's attorney was not available), I informed Delta's counsel that a transcript would have to be provided because Delta, as counsel announced, was relying on statements in the audio as well as the scenes shown in

the video. An exhibit number, Respondent's Exhibit 7, was designated for the transcript. The parties agreed to stipulate to as much as possible.

By letter dated April 19, 1996, to me (and received that date), Delta delivered copies of Respondent's Exhibit 7, consisting of two pages. I have included with the official exhibits, as Respondent's Exhibit 7, both the one-page cover letter and the two-page transcription. Thus, Respondent's Exhibit 7 now consists of three pages. [In the opening entry on the transcript, correct the spelling of "ya'lls employees" to "y'all's employees." The *American Heritage Dictionary* at 1565 (3d ed. 1993); M. Hicks, *How To Be Texan*, first item (1981, Gulf Publishing Co.). Moreover, although McGee is there speaking to Brenda Owens, the reference is plural because it implicitly includes Delta. Indeed, "y'all" always is plural in reference. The *American Heritage Dictionary*, id.]

Attached to the General Counsel's brief is the Government's two-page version of the correct transcript. Differences are mostly minor and insignificant. Toward the end of the Government's version, one John Davis is shown as saying "Thank you." As Davis is not otherwise identified, or the entry as to him stipulated, I shall disregard the hearsay reference to Davis. (A "Voice" is acceptable.) I consider the whole videotape, under the rule of completeness (Fed.R.Evid. 106) as the General Counsel requests (Br. at 7 fn. 5). In so doing, I consider the statements by Lockwood because he is identified in the testimony as the person operating the camcorder. As the voice attributed to Lockwood sounds right at the camcorder, I infer and find that it is Lockwood's voice. In any event, Lockwood's statements are of little significance here.

With one major exception (discussed later), McGee's description of the lobby conversation on December 29 is consistent with Respondent's Exhibit 7. My description of the lobby conversation also relies on my own viewing of the videotape (R. Exh. 4).

I correct Respondent's Exhibit 7 at certain points. At page three (p. 2 of the transcript), third entry, Brenda Owens is listed as stating, "We only take applications if we are hiring." Consistent with the Government's version, following that statement, I find, Owens also added, "and we're not hiring." At the end, McGee is shown as stating, "We're not harassing you." Change that to, "I'm not harassing you. We just want to put in an application, that's all." Finally, following the end of Respondent's Exhibit 7, and consistent with General Counsel's Exhibit 8, show Lockwood as stating, "Thank you very much, ma'am." Show McGee adding, for the final entry, "Thank you." I now receive Respondent's Exhibit 7 in evidence. I also receive, as General Counsel's Exhibit 8, the General Counsel's version so that the record will be complete.

B. The Alleged Threats

1. Agency status of leadman Dewey Snyder

Although the complaint alleges that Dewey Snyder is (or was during the relevant time while leadman at the Conroe job) a statutory supervisor and a statutory agent, an allegation denied by Delta, I need not reach the issue of super-

³For background, see *Jencks v. U.S.*, 353 U.S. 657 1007 (1957); 18 U.S.C. §3500; *JMB Properties Co.*, 305 NLRB 978, 984 (1991), and the annotation by David B. Harrison, What is a "Statement" Under Provisions of Jencks Act (18 U.S.C. §3500) and Rule 26.2 of Federal Rules of Criminal Procedure Providing for Production of Statement of Witness Following Witness' Direct Examination, 125 ALR Fed. 1, 21, 51 (1995).

⁴*U.S. v. Skillman*, 442 F.2d 542, 553-554 (8th Cir. 1971); *U.S. v. Sopher*, 362 F.2d 523, 525-526 (7th Cir. 1966).

⁵*JMB Properties Co.*, 305 NLRB 978, 984 (1991).

⁶*U.S. v. Carter*, 70 F.3d 146, 147-148 (D.C. Cir. 1995), suggests that the District of Columbia Circuit Court might find such recordings to be producible under *Jencks*. Although the court does not there cite *Sopher*, it did in the earlier case of *U.S. v. Bryant*, 439 F.2d 642, 650 fn. 2 (D.C. Cir. 1971).

visory status,⁷ as it is sufficient for 8(a)(1) analysis if Snyder was a statutory agent. *Bat-Jac Contracting*, 320 NLRB 891 fn. 2 (1996); *United States Service Industries*, 319 NLRB 231 fn. 2 (1995).

Former General Superintendent Danny Winters testified that Leadman Snyder directed the work of the sheet metal employees on the Conroe job, including who would do what work, when, and in what numbers. (1:31, 33.) The Conroe (Moorehead School) jobsite was some 40 miles from Delta's office, and Winters averaged only two visits a week to the jobsite. (1:32.) Winters admits that, in his (extensive) absences from the jobsite, Snyder made the decisions as to which crews worked in which areas. (1:32-33.) Winters told new hires that Snyder was the leadperson (1:36), and Winters concedes that a sheet metal employee working on the job would understand, from the information Winters imparted about Snyder, that the employee had better do as Snyder instructed. (1:36.) Sheet metal employees on the job would check with Snyder if they wanted time off for personal business, more money, or the like, and Snyder would report the matter to Winters for evaluation. (1:37-38.) Winters preferred to let Snyder resolve any personal disputes between employees on the job, and Snyder could rearrange the crews to accommodate such grievances. (1:39, 60, 63.) Winters acknowledges that sheet metal employees on the job, in Winters' absence, would view Snyder as speaking for Delta respecting such matters as work assignments. (1:40.)

These facts, and the entire record, compel the finding, which I make, that Delta, at all relevant times, placed Leadman Dewey Snyder in a position where employees reasonably could believe that Snyder spoke on behalf of management. Finding, therefore, that leadman Snyder was an agent within the meaning of 29 U.S.C. § 152(3), I further find that Delta is responsible for the statements, described below, attributed to him. *United States Service Industries*, supra.

2. The January 6, 1995 threats of discharge

a. Alex Soria

Complaint paragraph 7(a) alleges that Dewey Snyder, at the Conroe jobsite on January 6, 1995, "threatened employees by stating that he would fire anyone who supported the Union." Delta denies. Union Organizer Douglas McGee credibly testified (1:120-121) that he went to the Conroe jobsite on January 6 and solicited employees. Sheet metal helper Alex Soria testified that, a few minutes after McGee's visit to the jobsite, Snyder told a group of employees, including Soria, that if he found that anyone "was union," he would fire them. (1:195-196, 199-200.) Snyder did not testify. Crediting Soria's description of the event, I find that, as alleged, Delta violated Section 8(a)(1) of the Act by statutory agent Dewey Snyder's threat of discharge on January 6, 1995. It is immaterial whether Snyder has actual authority to fire. As Snyder reasonably was viewed as Delta's agent, em-

ployees reasonably would fear that Snyder would be able to engineer their discharge if he so desired.

b. Donald G. Schurr

Complaint paragraph 7(b) alleges that, about January 13, 1995, at the Conroe jobsite, Dewey Snyder "threatened employees by stating union people were sorry S.O.B's and he couldn't have them on the job." Respondent denies.

Sheet metal mechanic Donald G. Schurr credibly testified that, about noon on January 6, 1995, Leadman Snyder told a group of employees, including Schurr, that most union members were "sorry SOB's," that he did not want to have any on the job, that he did not care for union members or sympathizers, and that he would "run them off the job if at all possible." No one in the group responded. (1:216-217.) Crediting Schurr's un rebutted testimony, I find that, as alleged (the slight difference in the date alleged is immaterial), Respondent Delta violated Section 8(a)(1) of the Act by this additional discharge threat which statutory agent Dewey Snyder uttered on January 6, 1995.

C. The Alleged Discrimination

1. The allegations and general contentions

Complaint paragraph 8 alleges that, commencing about December 29, 1994, and continuing to date, Delta has failed to consider for employment the seven employees named below, and has refused to allow them to file applications for employment:

Lance Bartran	John Leraan
Ernest Castelow	Troy Lockwood
John Davis	Douglas McGee
Paul Hurysz	

The motive for such conduct, complaint paragraph 9 alleges, was because the employees assisted the Union and in order to discourage employees from joining or supporting the Union. By the conduct alleged in paragraphs 8 and 9, paragraph 11 alleges, Delta violated 29 U.S.C. § 158(a)(3). Delta denies all the allegations.

To the General Counsel, this is an uncomplicated "salting" case in which Delta unlawfully refused even to consider for hire any of the seven union members, including Union Organizer Douglas McGee, who made a videotaped request for job applications on December 29, 1994. Respondent Delta makes two main points. First, there were no job openings on December 29, and Delta does not accept job applications unless it has job openings—a lawful policy. Accordingly, Delta did not accept applications on December 29. Second, the Union group's December 29 entrance into the small lobby of Delta's office was a videotaped invasion designed to intimidate and harass Delta (for an unknown purpose), and its female office secretary, and was not part of a good-faith effort to be hired as employees. Because the group's conduct was not a good-faith effort to be hired, the participants in the videotaped invasion were not statutory employees. As the invaders were not employees (because not making a good-faith application for employment)—the classification protected by the Act—the complaint must be dismissed.

⁷ Unlike *Adco Electric*, 307 NLRB 1113 (1992), enf. 6 F.3d 1110 (5th Cir. 1993), where Job Foreman Langford was fired expressly for union organizing, and a supervisory finding would have defeated the allegation of an unlawful discharge, Snyder's job security is not in issue here.

2. Background

Douglas McGee has been an organizer for Sheet Metal Workers Local 54 since July 1994. (1:107.) Since becoming an organizer for Local 54, McGee has worked for several companies, leaving only for better pay or as a result of being fired for protected activities. (1:152-156.) On July 28, 1994 (after first visiting the Conroe jobsite 3 days earlier, and the shop on July 28), McGee made his first visit to Delta's office where he and Gary Yarborough, a business representative for the Union, picked up employment applications from the secretary, Brenda Owens. They returned the completed applications to Owens on August 1, telling Owens that they wanted work as sheet metal mechanics on the Conroe project or at the shop. (1:109-110, 122, 156-159, 161.) Owens said that General Superintendent Danny Winters was not in, and that they could call or come back. When they later called, Winters was never in. A few days later, on August 4, McGee and Yarborough tracked Danny Winters, Delta's general superintendent, down at the shop and asked him about their applications and if he needed any help. Winters told McGee and Yarborough that at the moment he did not need anyone but that if something came up he would call them. (1:122, 160.)

On November 30 McGee again visited Delta's Conroe project (the Moorehead School jobsite) where he (secretly, apparently) tape recorded his conversation there with leadman Dewey. A transcript of the recorded conversation is in evidence (R. Exh. 3). The transcript confirms McGee's testimony that Snyder told McGee that Delta not only needed help at Conroe, but also at the shop, but that he had to see Danny Winters. (1:110-111.) Consequently, McGee went to Delta's office that same day and told Brenda Owens that he had just talked with one of the foremen at the Moorehead School job and that he wanted to apply for work. Owens told McGee that Winters was in the field and that Delta was not hiring. (1:111-112, 177-178.)

In December Donald Schurr reported to McGee that Delta was hiring for the Conroe job. (1:113.) Schurr visited Delta's office on December 6, applied on December 9 (G.C. Exh. 2), and was hired by Winters on December 14. Told by Winters to report to the Moorehead School job, Schurr reported the next morning, December 15, to the Conroe jobsite. (1:207-209, 223-227.) Schurr worked there as a sheet metal mechanic until February 24, 1995. (1:231, 237, 240.) On his job application, Schurr listed some former employers who were union contractors. (Schurr had been a member of Local 54 for several years, dropped his card in 1990, and was reinstated in April 1995. 1:221-222.)

During the December 14 hiring interview, Winters asked Schurr where he had received his sheet metal training. Schurr explained that it was with the Union, but that he was not then a member of the Union. (1:225-226.) When Winters visited the Conroe job on January 7 (the day after McGee's visit there), Schurr asked Winters, in the presence of leadman Snyder, what "was the deal with the union being on the job." Winters replied that he supposed the Union was trying to organize, and that he would hire union personnel if he had to. Winters said he would hire McGee, even though he was a union member, because "he seems to be qualified." Winters said he had checked with McGee's previous employers and they reported that McGee "had made them money." (1:217-219.) Winters' limited testimony on this conversation

is generally consistent, although he recalls making no reference to McGee. (1:41, 49, 246.) Winters denies telling anyone that he had checked on McGee and that he would not mind hiring McGee, because McGee had made money for his previous employers. (1:42.) Schurr testified in more detail, and more persuasively, and I credit him, particularly as to the reference to McGee. It is immaterial whether Winters voluntarily expressed a willingness to hire union members if he had to do so, or whether, as Winters recalls (1:246), that came in response to a question by Schurr whether Delta would hire union members.

Winters testified that he also hired four other sheet metal mechanics about mid-December 1994: Jay W. Fredieu, Bert G. Hale Jr., Byron J. Hill, and Billy H. Howard. (1:50, 54.) Winters testified, however, that he hired them, not for the Moorehead School job, but for another job, the Steeplepoint project (administrative office for the Cy-Fair school district, 1:54-55), and that they were transferred to the Moorehead School job around late February to early March 1995 as the Steeplepoint project was winding down. (1:51, 53-54, 67-70, 76-77, 87.) So far as Winters recalls, he hired no sheet metal mechanics during the last 2 weeks of December 1994, or January 1995, for the Moorehead School job. (1:55, 76, 86-87.) Donald Schurr testified that, so far as he knows, no sheet metal mechanics arrived (were "employed") on the Moorehead School job after his December 15 arrival, through January 1995. (1:227.)

Payroll records in evidence reflect only 1995 dates for Donald Schurr (G.C. Exh. 3a), Byron J. Hill (G.C. Exh. 4a), Jay W. Fredieu (G.C. Exh. 5a), Bert Gene Hale Jr. (G.C. Exh. 6a), and Billy H. Howard (G.C. Exh. 7a). Jerry Winters, Delta's president (called as an adverse witness by the General Counsel), testified that it appeared the exhibits (G.C. Exhs. 3a-7a) were for 1995 only. (1:95-96.) He testified that Brenda Owens prepares Delta's payroll records. (1:90.) Winters implies that (as the taxing authorities must surely require) Delta has 1994 payroll records somewhere. (1:96.) Employees are given numbers, and President Winters assumes, but does not know, that the number 601, for example, means that the employee was hired after the employee with number 600, although possibly earlier and now vacant numbers may be given to the later hired employee. (1:91-92.) Winters does not know whether a reemployed employee is given his previous number or a new number. (1:92.) No party called Brenda Owens to testify.

Delta's pay records (G.C. Exhs. 3a-7a) reflect a weekly pay period. The employee numbers either closely follow that of Schurr's 606 (G.C. Exh. 3a), such as Byron Hill's 608 (1:93), or precede Schurr's, such as Hale's 501 (G.C. Exh. 6a) and Fredieu's 537 (1:93). Danny Winters testified that of those aside from Schurr, all were rehires except for Hill. (1:80-81.) President Winters could not confirm, but asserts that Delta has records which would show whether an employee has had a break in service. (1:94-95.) Danny Winters testified that an employee would have started work a week to 10 days before his first appearance on the pay records. (1:88.)

Although the General Counsel argues (Br. at 7) that the record demonstrates that employees Fredieu, Hale, Hill, and Howard were hired after December 29, 1994 (with, apparently, three in January 1995, from early to late January), I find the record lacking in this respect. So far as the evidence

shows, only some of the relevant payroll records were introduced. No party called Brenda Owens, Delta's office person who prepares the payroll and, presumably, maintains the payroll records. The General Counsel contends (1:30) that the documents reflect an early 1995 hire date for the Fredieu group, I find that they fail to so reflect. Indeed, the pay sheet (G.C. Exh. 4a) for Donald Schurr begins with a check for the short week (2 days) ending January 3, 1995, yet no one disputes Schurr's own testimony that he was hired on December 14 and reported to work on December 15. (1:209, 227.) Responding to a leading question by the Government whether he remembered that his first paycheck came in early January 1995, Schurr testified, "I believe so, sir." (1:209.) Nevertheless, it is clear that Schurr's first paycheck in January (G.C. Exh. 3a) was for working 10 hours on Tuesday (January 3) and 10 hours on Wednesday (January 4). I find that Schurr also worked during the second half of December 1994, but that there are no 1994 payroll records in evidence to reflect this fact.

The 1995 payroll records do not demonstrate that the other four employees, the Fredieu group, began work in mid-December 1994, as Danny Winters asserts. The payroll records are not listed by the construction project. So far as the record reflects, the payroll records are incomplete. Thus, I find neither support for nor contradiction of Danny Winters' testimony that the other four employees (Fredieu, Hale, Hill, and Howard) actually began working on the Steeplepoint project about mid-December. As Winters' testimony on this point was clear, I find, on the basis of this record, that the other four employees (Fredieu, Hale, Hill, and Howard) were in fact hired about mid-December 1994 and began working at that time on the Steeplepoint project, from which they later transferred to the Moorehead School job.

3. The videotaped group visit of December 29, 1994

On either December 29 or the day before, Local 54 organizer McGee called Troy Lockwood, an electrician and a member of IBEW Local 716, and asked whether Lockwood would like to go with McGee to apply for work at Delta. Lockwood said he would be there, and he volunteered to take his camcorder. (1:178-179, 185-186.) In addition to Lockwood, John Davis also was a member of IBEW Local 716. (1:181.) Thus, of the seven, five were sheet metal mechanics, and two were electricians. (1:164-166.)

About 11:15 the morning of Thursday, December 29, 1994, McGee and the other six named in the complaint entered Delta's office. As Lockwood was operating the camcorder, he does not appear on the videotape. (1:113-115, 117, 163-164, 175.) Lockwood's (apparently) voice can be heard at times, however, as he speaks. As the videotape (R. Exh. 4) reflects, the office lobby is not large, and the seven applicants, all but two standing, give the lobby a rather crowded appearance. At trial McGee "guesses" that the lobby is about 12-feet long by about 6-feet wide. (1:180.) On video, the lobby would appear to be a foot or two larger both ways. Even so, the lobby, whatever its correct dimensions, is not large. A window opens onto the lobby from the office area. At times on the video a white female (presumably Brenda Owens) may be seen at the window (on the office side) or, through the window at other times, farther back in the office area. Lockwood, as the camcorder's operator, frequently shifted the camcorder's focus to those in the lobby

to show activities there, such as when McGee was reading a document posted on the lobby wall.

McGee testified (and the video reflects) that he walked to the window and spoke to Owens. (1:115, 180.) [Owens can be seen shrinking back from the focus of the camcorder and the lights directed at her. Delta apparently had no policy in place instructing Owens to demand that visitors not operate such equipment and to call the police if they refused to turn it off or to leave the premises.] McGee told Owens that he was a sheet metal worker with Local 54, that the men with him were all members,⁸ that they had talked with some of Delta's employees and understood that Delta needed some help, and that they were there to apply for sheet metal work. (1:115, 165-167, 181.) McGee acknowledges that Owens was "very busy trying to answer the phones and everything." (1:115.)

McGee is seen on the video wearing a bright red nylon jacket with a large logo of Local 54 on the back and a small logo on the left front. Underneath his red jacket, which was open, McGee was wearing a white T-shirt bearing a legend which includes the phrase, "Union, Yes," with a check mark in a square, as if depicting a yes vote on a ballot. One of the others, who stood next to the window, also wore such a T-shirt on the outside of his regular shirt.

With the camcorder and its lights focused on Owens (as the video reflects), McGee testified that he asked Owens whether Delta was accepting applications. "Not that I know of," Owens replied, and "you need to talk to Danny" [Winters]. Owens said that Delta does not accept applications when the Company is not hiring. Either Lockwood or McGee asked whether they could make an appointment with Winters or call him. Owens said that Delta did not accept applications when the Company was not hiring. (1:116.)

Saying she needed to talk to Winters, and that she would page him, Owens stepped to a telephone farther back in the office. Eventually she went into a back office. (Lockwood focused the camcorder on a clock on the back wall. The time shown can be seen as about 11:18.) Returning to the window 2 or 3 minutes later, Owens pointedly (literally, on the video, to Lockwood) requested that she not be videotaped. She then told the group that Delta was not hiring, and that they needed to contact Danny Winters. (1:116.) Ignoring Owens' request that she not be videotaped, and with the lights of the camcorder directed at Owens, Lockwood asked whether there was a sign-in sheet where the group could leave their names and telephone numbers so that Winters could contact them for employment. As McGee recalls, Owens merely said that Delta was not accepting applications, that Delta was not hiring, and that the group needed to contact Winters.

McGee then asked whether his "July" [August 1] application was still good. Owens answered that applications were good only for 30 days. McGee countered that he had been inspecting the hiring policy posted on the wall, and that the posted policy stated that applications are good for 30 days or until the job applied for has ended. At that point Owens asked the group to leave, and the seven complied. (1:116-

⁸ This was misleading, of course, as Lockwood and Davis were members of IBEW Local 716. McGee testified that Lockwood and Davis, had they been given the chance, would have applied for positions as sheet metal helpers. McGee saw no need to tell Owens that the two were members of Local 716. (1:164-167.)

117.) Timing of the video discloses that the group was in the lobby for about 6 minutes.

McGee's recollection of the final exchange with Owens fails to disclose, as the video shows, that he began debating with Owens concerning whether Delta needed help. She then said that they were harassing her and she asked them to leave. Lockwood is heard saying they would do so, but McGee, as he also starts to leave, denies that he was harassing her, and states that they merely wanted to file an application for work.

At trial Danny Winters identified a one-page document (R. Exh. 1), dated January 13, 1994, as the posted hiring policy. (1:70-71, 83-84.) McGee testified that item 5, in specific, was part of what he read posted on the wall that December 29. (1:118, 180.) Item 5 reads (R. Exh. 1):

5. Applications will be considered active for thirty (30) days or until all vacancies on the project for which they were accepted have been filled, whichever period comes first.

McGee testified that the group was there to get jobs. (1:115, 183-184.) He denies that they were there to harass Delta with the camcorder (1:176), and denies that the visit was part of some game or effort to cause trouble by persons not interested in working. (1:184.) The purpose of the videotape, McGee testified, was to document that the group was there applying for work. (1:176.) McGee credibly testified that he was ready to go to work on December 29, and that it was his intention to obtain employment for Delta, to make Delta "some money" [that is, to do quality work efficiently], and, also while employed, to try and organize the employees and Delta. (1:176-177.)

On January 17, McGee again went to the office and asked if Delta was accepting applications. Owens said no, that Delta was not hiring. McGee said he would work as a helper. Owens said that Delta retained all applications, and that Winters had his application. (1:119.)

4. Discussion

In the absence of credited evidence that the four employees (Fredieu, Hale, Hill, and Howard) were hired shortly after December 29, 1994, there is no evidence which, even *prima facie*, establishes either that Delta had job openings on December 29, or at least that as of that date it contemplated near-future job vacancies, or that contradicts Delta's written policy rule number 2 (R. Exh. 2) that applications "will be accepted only when the company is hiring." As the December 29 videotape and transcript (both R. Exh. 7 and G.C. Exh. 8) reflect, Brenda Owens clearly told union organizer McGee more than once that Delta was not hiring, and that Delta accepted applications only when the Company was hiring. Indeed, after Owens, fed up with what she described as harassment of her, told McGee to clear the office (with McGee arguing that he was not harassing her), Owens stated, "And I told you, we are not hiring and we're not taking applications."

The payroll records are incomplete, and the evidence fails to account for the reason. The General Counsel argues (Br. at 8) that it was Respondent's burden to come forward with the pertinent records or suffer an inference that they do not exist, citing *Macy's California*, 305 NLRB 498, 500 (1991).

Macy's is misapplied. There the General Counsel introduced positive evidence concerning the employment application of Cynthia Gomez. That an adverse inference was drawn from Macy's failure to produce the employment application merely reinforced the Government's positive evidence (the testimony of Gomez). Here the Government's affirmative evidence is incomplete. As a result, the General Counsel has not carried the Government's burden of establishing that, contrary to the testimony of Danny Winters, employees Fredieu, Hale, Hill, and Howard were hired, not in mid-December 1994 (as Winters testified), but beginning in early January 1995.

Unlike cases such as *H. B. Zachry Co.*, 319 NLRB 967 (1995), where there was an unlawful refusal to consider, I find that here the evidence fails to establish, *prima facie*, that Delta's December 29, 1994 refusal to consider was unlawful, as alleged. Accordingly, I shall dismiss complaint paragraph 8.

CONCLUSION OF LAW

Based on the record, I find that the Board has statutory and discretionary jurisdiction; that Respondent Delta is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; that Local 54 is a statutory labor organization; that Delta violated Section 8(a)(1) of the Act, but not Section 8(a)(3) of the Act; and that Delta's violations have affected and, unless permanently enjoined, will continue to affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Portions of standard paragraphs of the order are included in compliance with *Indian Hills Care Center*, 321 NLRB 144 (1996).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹

ORDER

The Respondent, Delta Mechanical, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge if they support a union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Houston, Texas, copies of the attached notice

⁹If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 3, 1995.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

¹⁰If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT tell you that we will fire anyone who supports Sheet Metal Workers Local 54, affiliated with Sheet Metal Workers International Association, AFL-CIO or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

DELTA MECHANICAL, INC.